THENE ARULMANI CHELVI ARUMUGAM v. LONDON WEIGHT MANAGEMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
MARY LIM JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-1195-06-2018]
21 AUGUST 2019

TORT: *Negligence – Duty of care – Claimant signed up for package of slimming treatments with company specialising in slimming services ('company') – Claimant given box of coffee and oat drinks – Claimant fell sick upon consumption of hot coffee – Complaints made to company ignored or not taken seriously – Whether injuries, loss or damage complained of by claimant caused by company – Whether claimant warned of risks and danger of treatments – Whether company owed claimant duty of care – Whether company negligent – Whether claimant had valid cause of action*

TORT: *Negligence – Damages – Claim for special, general exemplary damages and aggravated damages – Claimant signed up for package of slimming treatments with company specialising in slimming services ('company') – Claimant given box of coffee and oat drinks – Claimant fell sick upon consumption of hot coffee – Complaints made to company ignored or not taken seriously – Whether injuries, loss or damage complained of by claimant caused by company – Whether damages proven*

The appellant took up a package of slimming treatments ('package') with the respondent, a company specialising in 'slimming services'. According to the appellant, (i) when she signed up for the package after attending the trial treatment, she had filled up and signed a slimming consultation card which detailed, *inter alia*, her medical and physical histories and food allergies; (ii) she was given a box of coffee and oat drinks to be consumed twice a day for five days and a diet meal to be followed strictly; (iii) upon consuming the first coffee sachet, she fell sick and her tongue became stiff and swollen and aside from experiencing difficulties in swallowing and chewing, she also could not talk properly and her head was in pain; (iv) when she informed the respondent, she was advised to drink more fluids, follow the diet and to attend the next slimming session; (v) she reacted badly to the various treatments where her skin broke out in ulcers, sores and redness and she experienced dizziness, palpitations, weakness, soreness and pain; and (vi) her complaints to the respondent were either ignored or not taken seriously. The respondent gave all sorts of reasons for the appellant's adverse reactions and did not investigate into the matter. In fact, the respondent seemed more concerned about the package. The appellant's condition and health continued to deteriorate until, after four treatments including the trial treatment, she finally ceased the treatments upon the advice of a doctor. The appellant

sought a refund of the balance sums already paid in full but the respondent refused. This prompted the appellant to file a claim premised on negligence, at the High Court, against the respondent for special damages consisting of the medical expenses related to her complaints, future medical expenses, general damages, punitive or exemplary damages, and aggravated damages, following the respondent's negligence in (i) not subjecting the appellant to proper physical tests or medical check-up before she bought the package and underwent the treatments; (ii) not monitoring or taking action including sending the appellant for medical attention upon her complaints; (iii) not explaining to the appellant the effects of the treatments; (iv) not warning her of the risks and danger inherent in the treatments under the package; (v) not having competent or trained staff; that the 'standards' were not in keeping with what was advertised; (vi) not ensuring that the treatment, as well as any drink or food provided, was safe, suitable and would not cause any severe or adverse reaction to customers like the appellant which could be fatal and damaging to their health; and (vii) continuously calling and harassing the appellant to continue with the treatment despite her sick and weakened state after consuming the coffee and undergoing the first few treatments. The appellant further relied on the doctrine of *res ipsa loquitur*. Disputing the claim, the respondent argued that (i) it was a slimming centre, offering different types of slimming treatments; (ii) it was not a medical centre or a centre offering medical treatment or advice and that it was never in the position to do so; (iii) the details of the package had been informed and explained to the appellant and she voluntarily signed up for the same; (iv) it was the appellant who, upon being inquired by the respondent, disclosed her own medical or physical history or condition; (v) the truth of such disclosure was entirely within the appellant's own knowledge; (vii) it had endeavoured to fulfil its obligation of reducing the amount of weight intended by the appellant; (viii) the coffee sachets were accorded with the relevant standards and all claims relating the same or otherwise were too remote or unforeseeable and were not recoverable; and (ix) the claim was without merit and there was no valid cause of action because: (a) it was an express or implied term of the agreement entered into between the parties that the appellant had accepted, agreed and/or assumed the risks of redness or discomfort and such related matters that arise from the treatments under the package; (b) the appellant had voluntarily assumed such risks; (c) the appellant would not claim or have any claims against the respondent; (d) the respondent was not liable for any claim, loss, damage and injury in the event the information provided by the appellant was not true and/or inadequate; (e) the appellant had enjoyed savings from a lower priced package as compared to its other individual priced treatments; (f) the appellant had accepted and acknowledged that the package was non-refundable and could only be exchanged for other items offered by the respondent; (g) the appellant

voluntarily bought the package; and (h) the appellant was either wholly or largely negligent for her injury, loss or damage. The trial judge dismissed the appellant's claim on the ground that the claim was not proved. The trial judge was sceptical if the appellant's complaints were related to the package for the following reasons: (i) lack of evidence of her medical condition before treatment; (ii) lack of medical report to link the appellant's complaints with the treatment under the package; (iii) the coffee sachets had not been sent for lab tests; (iv) that Dr. Gan ('PW3'), the consultant physician and gastroenterologist called by the appellant had testified that the appellant had requested a letter from him saying that she was suffering from the effects of the treatment by the respondent and that he had refused; (v) that PW3 had testified that it was impossible to determine the direct cause of the appellant's condition; (vi) the appellant's credibility was not good on various levels in that she had repeatedly insisted that she had gone to the respondent for spa and not slimming treatments when the respondent was clearly a slimming centre; and (vii) she paid for the customised package by 12 instalments paid through her husband's credit card but when challenged to produce evidence, the appellant failed to do so. Hence, the present appeal. In support of her appeal, the appellant submitted that (i) contrary to the trial judge's findings, she had (a) successfully established her case in negligence on all fronts; and (b) proved the existence of a duty of care owed by the respondent, that there was a breach of that duty and damage had resulted from such breach; (ii) not only were there erroneous findings of fact, the trial judge had also applied the wrong principles of law, that the clause in the slimming consultation card which precluded any party, including the appellant, from enforcing her rights under a contract, was void under s. 29 of the Contracts Act 1950; and (iii) there was evidence of lack of partiality on the part of the trial judge and a propensity to prejudge the case from the prejudicial comments and remarks made against the appellant even before the appellant testified and the remarks made in the course of the appellant's testimony.

Held (allowing appeal with costs; setting aside decision of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) While the trial judge was the person best positioned to deal with the question of oral testimony and the weight to be accorded to such evidence, that evaluation must nevertheless be properly conducted in accordance with settled principles of law. The decision reached was plainly wrong as the trial judge failed to sufficiently appreciate the evidence led such that the decision reached was one that no reasonable court, having properly directed itself and asked itself the correct questions, would have arrived at that same conclusion as the High Court did in this appeal. Contrary to the trial judge's findings, the burden of proof had been discharged by the appellant. (para 18)

(2) While the trial judge may not have set out the law and the legal principles required to be applied in the particular claim, it could be reasonably concluded that the court was examining those same elements but had come away unconvinced about the validity of the claim. The trial judge was especially concerned about the fact that the causative element, whether the injuries, loss or damage complained of by the appellant existed and whether such injuries, loss or damage were caused by the respondent. The pleadings illustrated that the respective parties were more than sufficiently aware of those elements of the tort that must be fulfilled on a balance of probabilities before the burden of proof was discharged. The defence of the respondent in fact argued that there was no breach and that the duty of care was respected at all material times; that there was a voluntary assumption of risk by the appellant; and that any damage or injury allegedly suffered was either too remote or not foreseeable. The pleadings thus confirm that no one, especially the respondent could claim to have been misled or even confused about what the claim or the case was all about. (paras 21 & 22)

(3) There was no doubt of the existence of such a duty of care owed by the respondent to the appellant. The relationship of the parties, though contractual to begin with, was nevertheless such that it may be readily concluded that there was proximity of relationship between them for this court to consider it fair, just and reasonable that the law imposed a duty of care on the respondent for the benefit of the appellant. However, the real question was how was that duty owed? Did the respondent owe a duty in the manner as claimed by the appellant? The answer must be in the affirmative. Given that the respondent was who it was, a specialist slimming centre established since 2000 with, at that material time, 14 years of relevant expertise and experience in successful slimming treatments or programmes for women who have weight issues; that these treatments and programmes with technological choices have been successful despite stiff competition in the industry; the respondent certainly owed a duty of care to all its customers who come to the respondent to be, what else, but slimmed. (paras 23 & 24)

(4) The slimming consultation card contained a fairly inquiring questionnaire on the appellant or intending customer's 'medical and physical history', asking or seeking to establish whether the appellant is 'unsuitable for slimming treatments' on a 'yes' or 'no' basis. The respondent's own slimming consultation card confirmed that there was a train of inquiry which the respondent routinely conducted before a customer was signed up for any of its treatments. That inquiry must be for the very purpose of establishing whether the appellant was suitable for any of the treatments that the respondent was able to provide. It did not lie in the mouth of the respondent to ask those material and relevant questions consonant with its duty of care and when something went

wrong, as it did in this appeal, turn round to dispute and deny owing such a fundamental duty of care. Furthermore, the treatments undertaken by the respondent involved ingestion of supplements or other concoctions including the coffee mixture. Such an intrusive treatment must carry a corresponding duty of care to ensure that whatever was provided or recommended was in fact safe and suitable for the customer, including the appellant. (paras 26-28)

(5) At the very minimum, the respondent, as the party who held out the expertise, the skill and the ability to provide slimming services, owed a duty of care to those who rely on that holding out and that rendering of such expertise, skill and services. At the very least, the respondent must put into place a regime or standard operating procedure where some proper or basic tests are conducted to ensure that the customer is fit and able to undertake the relevant package, whether customised or otherwise; that all customers or clients are monitored throughout the duration of the treatment with the respondent. The same must be said about having a response kit in the event of any adverse reaction to any of the treatments undertaken. The respondent must also ensure that its staffs are competent, suitably and adequately trained for these purposes. (para 29)

(6) The respondent was under a duty to warn or alert all its customers, regardless the manner in which the package is drawn up, of any adverse effects that its treatments may untowardly bring. More so, where those adverse effects or any drawbacks or reactions are known to the respondent. The respondent was further under a duty to take all necessary actions to react and redress the harm, when it was alerted of the same by the customer, which the appellant did, in this appeal. The respondent owed a duty to ensure peremptory action or care is readily available in the event of any unpleasant incident, such as those complained of by the appellant. It was reasonably foreseeable that if the respondent failed in any of the respects discussed above, harm, injury, loss and damage may ensue. The proximity of the parties by virtue of their contractual relationship wherein the appellant relied on the respondent's expertise and professionalism in weight management, it was just and reasonable to conclude the existence of a duty of care owed by the respondent. (paras 31-33)

(7) The propensity and weight of evidence led by the appellant were more than sufficient to discharge the burden of proof on a civil balance of probabilities. At no time was there any suggestion that the appellant's complaints were imagined or false. It would be reasonable to say that at the time the parties entered into the contract for the package, the appellant could not have been suffering from any of the ailments or

complaints now raised in her claim. Had she been, it would be unreasonable and surely a breach of its duty of care had the respondent nevertheless proceeded to provide the package. There was no reason to doubt the appellant's version of her complaints. With the proximity of these various events, coupled with documentary proof of her complaints at the material time, the burden of proof had been discharged by the appellant. Unfortunately, all these pieces of evidence were not considered by the trial judge. Under such conditions, the trial judge ought to have accepted the appellant's evidence and find for the appellant. Had this been undertaken, the trial judge would have found the appellant's case more probable than the respondent's, the case thus proved, and the claim allowed. (paras 47, 48 & 51)

Case(s) referred to:

Arnica Corporation Sdn Bhd v. Robert Teo Keng Tuan & Anor & Other Appeals [2015] 1 LNS 1220 CA ***(refd)***

CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

Muniandy & Ors v. PP [1966] 1 LNS 110 FC ***(refd)***

Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 29

For the appellant - Lim Jit Kiong; M/s JK Lim

For the respondent - Bahari Yeow Tien Hong, Lim Zhi Jian & Choo Wen Chun; M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: Appeal from High Court, Shah Alam; Civil No: BA-22NCVC-119-02-2017 (overruled).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

[1] The appellant took up a package of slimming treatments with the respondent. After several sessions, the appellant's health deteriorated. She then stopped the course and sued the respondent for pain and suffering, loss and damage caused by the negligence of the respondent. The claim was dismissed after a full trial. On appeal, we allowed the appeal and entered judgment against the respondent for the following reasons.

The Slimming Course

[2] The respondent is a company specialising in "slimming services". It is not in dispute that on 18 March 2011, the appellant undertook and paid for a package of such services known as "Lavender Lipo Management Treatment" ("the package") at the respondent's IOI branch. The package consisted of:

(i) ten sessions of detoxifying and rejuvenating scrubs;

(ii) ten sessions of hot treatment;

(iii) ten sessions of fat-burning treatment; and

(iv) one box of 15 sachets of London Express Coffee.

[3] After four sessions including the trial session, the appellant stopped. According to the appellant, she had signed up for the package after attending the trial treatment on 18 March 2011. That trial treatment involved the appellant filling up and signing a slimming consultation card which detailed amongst others, her medical and physical histories, and her food allergies. Upon signing the slimming consultation card, the appellant was given a box of coffee and oat drinks which was to be consumed twice a day for five days, and a 'diet meal' which she was required to follow strictly.

[4] Upon consumption of the first coffee sachet, the appellant claimed that she fell sick after consuming the coffee, her tongue became 'stiff and swollen' and that she had difficulty swallowing or chewing. She was unable to talk properly and her head was 'in pain'. The appellant claimed that she immediately informed the respondent of her condition whereupon she was advised to drink more fluids, followed the diet planned for her and to attend the next slimming session. The appellant further alleged that she reacted badly to the various treatments that she underwent including the sauna, lavender oil and sea salt wraps, that her skin broke out in ulcers, sores, and redness, that she was dizzy, had palpitations and was weak and constantly in pain or sore, etc.

[5] Despite informing the respondent of these complaints, the appellant claimed that her complaints were either ignored, disregarded or never taken seriously by the respondent who was more concerned about the package, giving all sorts of reasons for the appellant's adverse reactions to the various treatments in the package. The respondent never investigated or looked into her complaints but instead suggested that the appellant's reactions to the electric impulse treatments, etc, were either temporary; or in the case of the sauna treatments, because the sauna was relatively new. The details of her complaints may be found at paras. 5 to 37.

[6] The appellant finally ceased treatment under the package upon advice of a medical doctor that she saw when she found her condition worsening and her health deteriorating. When the appellant sought a refund of the balance sums already paid in full when she signed up under the package, the respondent refused. The appellant further claimed that her condition had not improved but had instead worsened, that she now suffers from amongst others, poor visibility and was adverse to the sun.

The Claim

[7] The appellant attended a total of four sessions over a course of two months. Apparently, the appellant "slimmed down" during this period. But, that is not her ground for suing the respondent in negligence.

[8] Her complaints are that the respondent is negligent in, *inter alia*:

(i) not subjecting the appellant to proper physical tests or proper medical check-up including blood pressure, urine, her general well-being, etc. before she bought the package and underwent the treatments in the package;

(ii) not monitoring or taking action including sending the appellant for medical attention upon her complaints as earlier set out;

(iii) not explaining to the appellant the effects of the treatments;

(iv) not warning her of the risks and danger inherent in the treatments under the package;

(v) not having competent or trained staff; that the "standards" were not in keeping with what was advertised;

(vi) not ensuring that the treatment as well as any drink or food provided is safe, suitable and would not cause any severe or adverse reaction to customers like the appellant which could be fatal and damaging to their health; and

(vii) continuously calling and harassing the appellant to continue with the treatment despite her sick and weakened state after consuming the coffee and undergoing the first few treatments.

[9] Aside from the above, the appellant relied on the doctrine of *res ipsa loquitur*.

[10] The appellant's claim is for special damages consisting of the medical expenses related to her complaints, future medical expenses, general damages, punitive or exemplary damages, and aggravated damages.

The Defences

[11] The claim was gravely disputed with the respondent's principal defences being these, that:

(i) it was a slimming centre, offering different types of slimming treatments; A

(ii) it was not a medical centre or a centre offering medical treatment or advice and that it was never in the position to do so;

(iii) the details of the package had been informed and explained to the appellant; B

(iv) the appellant voluntarily signed up for the package;

(v) it was the appellant who upon being inquired by the respondent, disclosed her own medical or physical history or condition;

(vi) the truth of such disclosure was entirely within the appellant's own knowledge; and C

(vii) it had endeavoured to fulfil its obligation of reducing the amount of weight intended by the appellant.

[12] The respondent further alleged that the claim was without merit and that there was no valid cause of action because: D

(i) it was an express or implied term of the agreement entered into between the parties that the appellant had accepted, agreed and/or assumed the risks of redness or discomfort and such related matters that arise from such treatments under the package; E

(ii) the appellant had voluntarily assumed such risks;

(iii) the appellant will not claim or have any claims against the respondent;

(iv) the respondent is not liable for any claim, loss, damage and injury in the event the information provided by the appellant is not true and/or inadequate; F

(v) the appellant had enjoyed savings from a lower priced package as compared to its other individual priced treatments;

(vi) the package was non-refundable; G

(vii) the package could only be exchanged for other items offered by the respondent;

(viii) the appellant had accepted and acknowledged that the package was non-refundable; H

(ix) the appellant had voluntarily and on its own volition bought the package; and

(x) the appellant was either wholly or largely negligent for her injury, loss or damage; I

[13] Insofar as the coffee sachets are concerned, the respondent specifically claimed that the product accord with the relevant standards; and that all claims whether relating to the coffee sachets or otherwise were too remote or unforeseeable and were not recoverable.

Decision Of The High Court

[14] The learned judge dismissed the appellant's claim on the ground that the claim was not proved. The learned judge was sceptical if the appellant's complaints were related to the package for the following reasons:

(i) lack of evidence of her medical condition before treatments;

(ii) lack of medical report to link the appellant's complaints with the treatments under the package;

(iii) that the coffee sachets had not been sent for lab tests;

(iv) that Dr Gan Lian How (PW3), the consultant physician and gastroenterologist called by the appellant had testified that the appellant had requested a letter from him saying that she was suffering from the effects of treatment by the respondent and that he had refused;

(v) that PW3 had testified that it was impossible to determine the direct cause of the appellant's condition; and

(vi) that the appellant's credibility "is not good on various levels" in that she had repeatedly insisted that she had gone to the respondent for spa and not slimming treatments when the respondent was clearly a slimming centre; that she had paid for the customised package by 12 instalments paid through her husband's credit card; that when challenged to produce evidence, the appellant had failed to do so.

Our Determination

[15] Before us, learned counsel for the appellant submitted that the appeal ought to be allowed because the decision was plainly wrong and appellate intervention was necessary to correct the injustice occasioned to the appellant. Contrary to the learned judge's findings, the appellant had successfully established its case in negligence on all fronts. The appellant had proved the existence of a duty of care owed by the respondent, that there was a breach of that duty and damage had resulted from such breach. Not only were there erroneous findings of fact, it was also submitted that the learned judge had applied the wrong principles of law, that cl. E in the slimming consultation card which precluded any party including the appellant from enforcing her rights under a contract is void under s. 29 of the Contracts Act 1950; that there was evidence of lack of partiality on the part of the learned judge and a propensity to prejudge the case from the prejudicial comments and remarks made against the appellant even before the appellant testified and the remarks made in the course of the appellant's testimony.

[16] The respondent maintained that the decision reached by the High Court was correct in law and on the facts; that there was "absolute lack of substantiation of the appellant's case"; in which case, there was no case for appellate intervention. Even if the appellant suffered damage, it was submitted that there was nothing to link such damage to the respondent. The respondent further emphasised that the learned judge "had made sufficient consideration, appreciation and assessment" on the appellant's credibility, submitting thus that this court should be slow to interfere with such findings as pronounced by the Federal Court in *Muniandy & Ors v. Public Prosecutor* [1966] 1 LNS 110; [1966] 1 MLJ 257.

[17] We were unanimous in agreeing with the appellant. This was indeed a fit and proper case for appellate intervention under the abiding principles of appellate intervention in a long line of high authority including the recent Federal Court decision in *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641 where the Federal Court opined that before the Court of Appeal can intervene using its limited appellate powers, the court must "undertake the appropriate review exercise" and "make the appropriate determination that the High Court had gone plainly wrong in its decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached." Similar decisions may be found in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1. It is only where the trial court has gone plainly wrong and that its decision cannot be reasonably explained or justified in that no reasonable judge could have reached such a decision that we may justifiably intervene.

[18] We find that threshold met in this appeal. While the trial judge is the person best positioned to deal with the question of oral testimony and the weight to be accorded to such evidence, that evaluation must nevertheless be properly conducted in accordance with settled principles of law. We are convinced that the decision reached was plainly wrong as the High Court had failed to sufficiently appreciate the evidence led such that the decision reached is one that no reasonable court having properly directed itself and asked itself the correct questions, would have arrived at that same conclusion as the High Court did in this appeal. Contrary to the learned judge's findings, we were amply satisfied that the burden of proof had been discharged by the appellant.

[19] This was a claim founded in negligence, the details of which were particularized in the statement of claim. Although the relationship between the parties had commercial overtones, the claim which may well have been brought in contract proceeded and relied on the law of torts.

[20] In this regard, the burden on the appellant was to prove the existence of a duty of care owed by the respondent to the appellant, a breach of that duty, and that any damage, injury or loss suffered was caused by that breach. Such loss or damage cannot be too remote or not foreseeable in which case, the appellant would be deprived of her claim.

[21] While the learned judge may not have set out the law and the legal principles that were required to be applied in the particular claim, it can nevertheless be reasonably concluded that the court was examining those same elements but had come away unconvinced about the validity of the claim. The learned judge was especially concerned about the fact that the causative element, whether the injuries, loss or damage complained of by the appellant existed and whether such injuries, loss or damage were caused by the respondent. This was in fact the respondent's case; it ran as their defence that it was for the appellant to show what her health was like before the treatments and why she had taken almost six years to file her claim. Because the appellant was unable to overcome those objections, there was no causative link between the appellant's complaints and the package provided by the respondent.

[22] The pleadings before the court illustrate that the respective parties were more than sufficiently aware of those elements of the tort that must be fulfilled on a balance of probabilities before the burden of proof was discharged. The defence of the respondent in fact argued that there was no breach and that the duty of care was respected at all material times; that there was a voluntary assumption of risk by the appellant; and that any damage or injury allegedly suffered was either too remote or not foreseeable. The pleadings thus confirm that no one, especially the respondent could claim to have been misled or even confused about what the claim or the case was all about.

[23] From the submissions of the respondent, it may also be reasonably concluded that the respondent does not deny owing the appellant a duty of care. It would be unfathomable in this day and age with such extensive developments in the law for the respondent to suggest that there is no duty owed. We, on our part, are in no doubt of the existence of such a duty of care owed by the respondent to the appellant. The relationship of the parties, though contractual to begin with, is nevertheless such that it may be readily concluded that there is proximity of relationship between them for this court to consider it fair, just and reasonable that the law imposes a duty of care on the respondent for the benefit of the appellant. (see the Court of Appeal's decision in *Arnica Corporation Sdn Bhd v. Robert Teo Keng Tuan & Anor & Other Appeals* [2015] 1 LNS 1220; [2016] 2 MLJ 119, applying the Federal Court decision in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1).

[24] But, the real question is how is that duty owed? Does the respondent owe a duty in the manner as claimed by the appellant? In our view, the answer must be in the affirmative. Given that the respondent is who it is, a specialist slimming centre established since 2000 with, at that material time, 14 years of relevant expertise and experience in successful slimming treatments or programmes for women who have weight issues; that these treatments and programmes with technological choices have been successful despite stiff competition in the industry (see para. 2 of the statement of claim) which is not denied by the respondent; the respondent certainly owes a duty of care to all its customers who come to the respondent to be, what else, but slimmed.

[25] The appellant is no exception. It is disquieting if not troubling to accept the respondent's proposition that because it is a slimming and not medical centre, it does not owe any duty of care to ensure that its customers, including the appellant, are suitable, able or even safe to undertake any of their treatments. It cannot say that because it is a slimming centre, it is not able to conduct or is not responsible for making some inquiry into or about the health of the intending customer before it provides the slimming treatments or even design a combination or package of treatments suitable for any customer.

[26] The slimming consultation card contains a fairly inquiring questionnaire on the appellant or intending customer's "medical and physical history", asking or seeking to establish whether the appellant is "unsuitable for slimming treatments" on a "yes" of "no" basis. The questions asked include whether the appellant is pregnant; has epilepsy, thrombosis, cancer, hepatitis, AIDS, muscle tear/ligament tear, psoriasis. The appellant is also asked about "treatments that require extra care": whether the appellant has heart disease, pacemaker, heavy intake of painkillers/sleeping pills, kidney/bladder ailment, fibroid, scarring from caesarean, liver/gall bladder disease, high or low blood pressure, asthma, IUD insertion, prosthesis, constipation/bowel problems, gastric problems, sensitive skin, muscle ache, diabetes, thyroid, hormonal medication, contraceptive medication, menstrual irregularities, menopause, cellulitis, etc.

[27] The respondent's own slimming consultation card thus confirms that there is a train of inquiry which the respondent routinely conducts before a customer is signed up for any of its treatments. That inquiry must be for the very purpose of establishing whether the appellant is suitable for any of the treatments that the respondent is able to provide. It does not lie in the mouth of the respondent to ask those material and relevant questions consonant with its duty of care and when something goes wrong, as it did in this appeal, turn round to dispute and deny owing such a fundamental duty of care.

[28] It is further noted that the treatments undertaken by the respondent involved ingestion of supplements or other concoctions including the coffee mixture. Such an intrusive treatment must, in our view, carry a corresponding duty of care to ensure that whatever is provided or recommended is in fact safe and suitable for the customer, including the appellant.

[29] In any event, we are of the opinion that at the very minimum, the respondent, as the party who holds out the expertise, the skill and the ability to provide slimming services, owes a duty of care to those who rely on that holding out and that rendering of such expertise, skill and services. At the very least, the respondent must put into place a regime or standard operating procedure where some proper or basic tests are conducted to ensure that the customer is fit and able to undertake the relevant package, whether customised or otherwise; that all customers or clients are monitored throughout the duration of the treatment with the respondent. The same must be said about having a response kit in the event of any adverse reaction to any of the treatments undertaken. The respondent must also ensure that its staffs are competent, suitably and adequately trained for these purposes.

[30] We thus find the respondent's contention that there is no duty owed for the reasons proffered quite untenable especially when the respondent sets about designing or customising a package of treatments to suit the customer, which it did for the appellant in this case.

[31] In our undoubted view, discounting the price for such a customised package does not in any way, lessen, let alone absolve the respondent from owing the appellant a duty to take care that its treatments, as customised, does not do any harm to the appellant. Although the treatments may not ultimately reduce or slim the appellant, and that is not the appellant's complaint or claim, it must always never harm or injure any of its customers. The respondent is under a duty to warn or alert all its customers, regardless the manner in which the package is drawn up, of any adverse effects that its treatments may untowardly bring. More so, where those adverse effects or any drawbacks or reactions are known to the respondent.

[32] The respondent is further under a duty to take all necessary action to react and redress the harm, when it is alerted of the same by the customer which the appellant did in this appeal. The respondent owes a duty to ensure peremptory action or care is readily available in the event of any unpleasant incident, such as those complained of by the appellant.

[33] In our view, it is reasonably foreseeable that if the respondent fails in any of the respects discussed above of, harm, injury, loss and damage may ensue. We agree with the appellant that the proximity of the parties by virtue of their contractual relationship wherein the appellant relies on the

respondent's expertise and professionalism in weight management, it is just and reasonable to conclude the existence of a duty of care owed by the respondent.

[34] Moving then to the issue as to whether there was a breach of that duty of care. In our opinion, the answer is also in the affirmative. Having heard the submissions and having examined the records of appeal, we find ample evidence supporting the appellant's claim of breach.

[35] In the first place, it is not the respondent's case that they have warned the appellant of the risks, of any adverse reactions, of what she was to do in the event of any untoward reaction, of the presence of competent staff, etc. The respondent's case is that it owes no such duty and is therefore not obliged to do any of the matters complained of. In any case, we find that there is overwhelming evidence of the breach.

[36] The appellant testified that she was generally of good health save for the weight issue for which she had approached the respondent; that she reacted adversely to the first four treatments in the manner complained of; that the respondent failed to address her complaints but instead told her to continue with their treatments including consuming the other coffee sachets whilst offering various explanations for her adverse reactions, none of which alleviated her complaints.

[37] We find that the appellant's version of her claim was consistently told and her testimony needed to be properly and fully evaluated by the learned judge. The appellant actually never deviated in cross-examination. What the learned judge had found wanting was the lack of scientific or other evidence such as a medical report of the appellant's condition prior to the treatments; or a lab test report on the contents of the coffee sachets; and an explanation as to why the appellant continued with the treatments despite the complaints. Without such evidence or explanation, the High Court was unable to connect or find a causative link between the treatments with any of the appellant's complaints.

[38] With respect, we find that the appellant need not go that far, especially in the light of the respondent's defence and the position it had taken at the trial. The respondent's single witness, Loke Siew Ching (Eva) (DW1), was a supervisor of the respondent at the branch where the appellant received her package. However, DW1 had no personal knowledge of the matters complained of, giving evidence from the records and was of no real assistance to the court. She was unable to provide any evidence on the appellant's complaints since she had none of the requisite knowledge. Her evidence thus should have been disregarded.

[39] By comparison, the appellant's evidence is supported by both documentary and oral testimonies.

[40] One such testimony emanates from Dr Gan Lian How (PW3), the consultant physician and gastroenterologist that the appellant saw when she first had her complaints. One of the reasons why the learned judge found the claim not proved was because of what PW3 testified; that the appellant had requested a letter from him saying that she was suffering from the effects of treatments by the respondent and that he had refused. This request was actually recorded in the patient's notes (see p. 224 of the record of appeal):

> Patient requested for a letter saying she is suffering from the effects of the treatment from London weight management, told her that that would be a very strong accusation that I will have to show evidence but there is none so the best I would do is to say that she should not continue with the programme.

[41] It is our respectful view that it was erroneous for the learned judge to have taken note of that piece of evidence and use it to dismiss the appellant's claim. It is our view that having taken note of that piece of evidence, it was then up to the trial judge to evaluate it in its entirety, and not to disregard PW3's evidence outright. Those same patient's notes form the contemporaneous record of PW3's findings of the appellant, that she had been warded at Columbia Asia Hospital at that material time for "investigation and treatment of for giddiness, headaches and sore throat for the past three weeks. We have yet to get to the bottom of her ailments. She has not recovered from this and needs to be on pain control medications", before opining that he did "not think she is in a condition to continue with the rest of the programme at your centre." The records further show that the appellant had told PW3 at that time that she had associated or "implicated" her complaints of "persistent headache, neck pain and swelling, feels pain when she stands up; claimed she's having blurring of vision too" to the "sliming treatments" as the cause of her complaints.

[42] Although PW3 could not associate or find the cause of the appellant's complaints, at no time did he find or record that her complaints were not genuine. In fact, the records show that PW3 treated the complaints as serious enough to warrant admission and treatment with medication. And, the appellant was warded for three days from 21 June 2011 to 23 June 2011. This timeline is consistent with the period of treatment: the appellant had three sessions after the trial session of 18 March 2011; that are on 23 March 2011, 13 May 2011 and 20 May 2011. The appellant ceased treatments under the package, as advised by PW3.

[43] The appellant's version of the facts was also corroborated by the evidence of her daughter, Shakti Mashini a/p K Rajan (PW2) who testified giving relevant contemporaneous evidence of what happened to the appellant after each treatment, what she was like before the treatments, what the respondent's reactions were to each treatment and, what happened each time

the appellant complained or raised them with the respondent. PW2 and her brother accompanied the appellant for her treatment with the respondent. She was therefore competent to testify directly on what happened; when the complaints first happened.

[44] PW2 corroborated and confirmed the appellant's evidence; testifying that before the treatment, the appellant was "a healthy and strong woman. She was able to do everything by herself and would not need anyone's assistance. She was a cultural dancer and she is very passionate about it. My brother and I were able to depend on her on everything as we were studying then." According to PW2, after every treatment, the appellant:

> … felt really sick and she would wake up in the middle of the night complaining about throbbing pain in her head and pain all over the body and she would vomit whatever she had for that day. It is terrible. She could not walk or stand for too long, her figure of speech was slow and she stutters when she talks. She even had to quit dancing. She is not able to perform her daily activities now. My brother and I had to quit school to look after her and my dad too had to quit his job.

[45] PW2 also testified that the appellant had come back "with red patches and wounds on her body and the wounds were not healing, instead, they were bleeding with pus in it. My father, my brother and I had to take her to Dr Munjeet. She also fainted once during the slimming treatments at the defendant's centre." Further, after the appellant stopped attending the treatment sessions, the respondent called "multiple times … and ask why she did not attend the session. Even when my mother tried to tell them of her health conditions she is suffering from, all they would say is okay and nothing more was being done."

[46] Like the appellant's evidence, the daughter's evidence was also not evaluated by the learned judge who was under a duty to do so. Had this evidence been evaluated, the court would have found, as any reasonable court would, that the appellant's case was more than sufficiently proved on the civil standard of liability.

[47] In our view, the propensity and weight of evidence led by the appellant were more than sufficient to discharge the burden of proof on a civil balance of probabilities. At no time was there any suggestion that the appellant's complaints were imagined or false. It would be reasonable to say that at the time the parties entered into the contract for the package, the appellant could not have been suffering from any of the ailments or complaints now raised in her claim. Had she been, it would be unreasonable and surely a breach of its duty of care had the respondent nevertheless proceeded to provide the package.

[48] We have no reason to doubt the appellant's version of her complaints. She even had a name of an employee of the respondent, one Fiona who was in-charge of her treatments but who stopped responding to her calls. The existence of Fiona is not in dispute. However, Fiona did not testify to discredit the appellant's testimony. Instead, it was DW1, Loke Siew Ching (Eva), who we have found wanting in her testimony. Worse, she was not even in the respondent's employment at the material time in 2011.

[49] Furthermore, the appellant had offered an explanation which we find most reasonable, as to why she had continued to consume further sachets of the coffee and attend three more sessions or treatments. According to the appellant, she had complained to the respondent and was told to, *inter alia,* "drink lots of water and stick to the meal planned and let the wound heal"; "they just proceeded with my session without saying anything"; and "that it's the fats washing out and asked me to drink lots of water and to rest". She was never told to stop. The same goes with why she continued with the treatments; she was given various responses by the respondent who never at any time, advised her to stop or discontinue with the treatment, even temporarily. The respondent even told the appellant that the side effects "is only temporary and it is the effect of the treatment."

[50] The frequently referred to "cold hard evidence" in the form of the appellant's medical records further bear testimony to her condition (see pp. 265 to 283 of the record of appeal) which reveal that the appellant continued to have complaints, and the fact that the appellant had seen one Dr Munjeet Singh who almost immediately upon manifestations of her complaints (he found evidence of a "burnt mark on her back" – see p. 215), referred the appellant to Columbia Hospital Puchong (DW3), in our regard, prove that the appellant's complaints are real, cogent and credible.

[51] With the proximity of these various events, coupled with documentary proof of her complaints at the material time, we find that the burden of proof had been discharged by the appellant. Unfortunately, all these pieces of evidence were not considered by the High Court. Under such conditions, the learned judge ought to have accepted the appellant's evidence and find for the appellant. Again, had this been undertaken, the learned judge would have found the appellant's case more probable than the respondent's, the case thus proved, and the claim allowed.

[52] The learned judge questioned the credibility of the appellant, noting that it was "not good on various levels", citing several examples. Amongst which was the appellant's insistence that she did not go to the respondent for slimming treatment but for spa treatment. After examining the slimming consultation card, the High Court found that with a name such as London Weight Management Sdn Bhd, the respondent was a slimming centre and had

been so known, that one would not pay the prices that the appellant paid had it been a spa treatment; that it was unable to comprehend why the appellant was lamenting when the payment was by 12 instalments through her husband's credit card; that she was not able to produce evidence when challenged.

[53] We have taken all those concerns on board but we have found that the hard documentary evidence as well as the oral testimonies of other witnesses in fact corroborated and supported the appellant's claim. The learned judge wanted proof of the appellant's state of health before and after treatment. We find that there was plenty of evidence to that effect and which a reasonable court may also draw proper inferences. And, as we have seen, there was no evaluation or no sufficient evaluation of all that evidence before the High Court came to the decision which is now the subject of appeal.

[54] The appellant who was in the pink of health before undergoing the treatments under the package suffered adversely as a result of those treatments. There was no reason why a person, 43 years of age at the material time, healthy and enjoying life including dancing but perhaps slightly overweight, hence seeking out some slimming treatments at the respondent's slimming centre, should almost immediately and upon taking of the treatments specially designed for her, suffer any of those side effects complaints. But for the treatments, the appellant would not have those adverse side effects, as confirmed by the doctors who treated her at the relevant time. Although PW3 was unable to say that the appellant's complaints were directly due to the treatments received, for the purpose of a claim in tort, we find adequate and sufficient evidence of the causative element to establish breach of duty of care and liability on the respondent's part. We have no hesitation that the causative link between the injury and complaints of the appellant and the treatments received under the package were not only reasonably foreseeable and not at all too remote, but were established by the appellant.

[55] We must next deal with the exemption clause in the "slimming consultation card" at p. 195 of the record of appeal. The respondent had argued that it was not liable by reason of this clause. Again, we must disagree.

[56] The term reads:

> London Weight Management will not be liable for any claims, losses, damages, injuries or death should the personal information provided be incorrect and/or insufficient.

[57] In that same consultation card which bears the appellant's signature, it is also stated that the appellant "hereby give my voluntary consent to undergo the treatments and I shall have no claims whatsoever against the company".

[58] The learned judge had made a passing reference to the existence of the above terms when discussing the nature and cost of the package without deliberating on the legal position of such a clause. We note that the respondent had cited the Federal Court decision in *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 in support of its proposition that the appellant must be bound by the express terms of the underlying agreement. With respect, that decision is of no application as the Federal Court was not dealing with the similar issue of validity of contractual terms under s. 29 of the Contracts Act 1950.

[59] Section 29 of the Contracts Act 1950 must be given due and proper application in this appeal; and it reads as follows:

> Agreements in restraint of legal proceedings void
>
> 29. Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent.

[60] As expounded recently by the Federal Court in *CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor* [2019] 2 CLJ 1, clauses or terms which preclude one contracting party from claiming any loss or damage and exempting the other contracting party from liability for any loss, whether direct or indirect, "incidental, consequential, exemplary punitive or special damages" violate s. 29 of the Contracts Act 1950. Such terms prohibiting or restricting a contracting party from seeking remedy against a defaulting party or a party in breach, as we see in this appeal, amount to a prohibition of access to justice which must be struck down for violation of s. 29.

[61] In this appeal, the respondent who is clearly in breach of its duty of care owed to the appellant has relied on this restriction clause to defend the appellant's claim. In our opinion, that is clearly prohibited and must be denied.

[62] For all the reasons explained above, we are constrained to hold that there were serious misdirection and proper judicial appreciation by the learned judge, especially in relation to the evidence before the court; that based on the totality of evidence led, no reasonable court properly apprehending, directing and asking itself the correct or appropriate questions would have arrived at the conclusion that the learned judge did in this appeal. Much of the reasoning of the High Court is also either inconsistent or is not borne out by the evidence led and for which wrong inferences or conclusions were drawn by the learned judge.

[63] We are fully satisfied that the burden of proof had been discharged by the appellant and that the claim ought to have been allowed. Consequently, we unanimously allowed the appeal with costs and set aside the decision of the High Court. We further entered judgment for the appellant and we remit the case to the High Court for assessment by the judge on the quantum of damages.

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